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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. KARL LOUIS GUILLEN, Petitioner.	2 CA-CR 2009-0411-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR93018631

Honorable Stephen F. McCarville, Judge

REVIEW GRANTED; RELIEF DENIED

Karl Louis Guillen — Florence
In Propria Persona

B R A M M E R, Judge.

¶1 Pursuant to a plea agreement, petitioner Karl Guillen pled no contest to second-degree murder following the stabbing of a fellow inmate. After finding no mitigating circumstances and numerous aggravating factors, the trial court sentenced Guillen to an aggravated, twenty-year term of imprisonment, to be served concurrently

with the sentences he was already serving. The court summarily denied Guillen's pro se petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and we denied relief on his petition for review from that ruling. *State v. Guillen*, No. 2 CA-CR 00-0494-PR (memorandum decision filed May 22, 2001).

¶2 About six years later, Guillen filed his second pro se post-conviction petition, in which he claimed, inter alia, that he was entitled to relief under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the United States Supreme Court held the Sixth Amendment to the United States Constitution requires that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 490. Upon review, we determined that, although the trial court incorrectly had found *Apprendi* did not apply to Guillen's sentences, he nonetheless was not entitled to relief. *State v. Guillen*, No. 2 CA-CR 2007-0019-PR (memorandum decision filed May 2, 2007). Guillen now petitions this court for review of the trial court's summary denial of his third petition for post-conviction relief. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶3 In both his petition for post-conviction relief and petition for review, Guillen first argues our May 2007 memorandum decision was incorrect in light of *Cunningham v. California*, 549 U.S. 270 (2007), and *State v. Price*, 217 Ariz. 182, 171

P.3d 1223 (2007).[1] *See* Ariz. R. Crim. P. 32.1(g) ("significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence" ground for post-conviction relief). In our May 2007 decision, relying on *State v. Martinez*, 210 Ariz. 578, 115 P.3d 618 (2005), we determined that because the trial court found Guillen's prior convictions constituted an aggravating factor it properly could find the remaining factors it then relied upon to aggravate his sentence. Based on *Cunningham* and *Price*, Guillen argues that, by doing so, we improperly "adopt[ed] the role of a trier of facts and sentencing court" by finding "new" aggravating factors "to save a flawed sentence."

¶4 In *Cunningham*, the United States Supreme Court invalidated a California sentencing scheme that "authorize[d] the judge, not the jury, to find the facts permitting an upper term sentence," thereby violating the Sixth Amendment. 549 U.S. at 293. In *Price*, our supreme court determined that an appellate court could not affirm a sentence based on factors not found by the trial court. 217 Ariz. 182, ¶¶ 17-18, 171 P.3d at 1227. Nothing in *Cunningham* or *Price* altered the law *Apprendi* established. And, unlike the intermediate appellate court in *Price*, we did not rely on factors not found by the trial court to affirm Guillen's sentence. We instead determined that, because Guillen's prior convictions exposed him to an aggravated sentence, the court did not violate *Apprendi* by

[1]To the extent Guillen suggests we misapplied *Apprendi* in our May 2007 memorandum decision, he may not raise this issue in a petition for post-conviction relief. Guillen's petition for review of that decision was denied by our supreme court and therefore this issue has been determined finally and he is precluded from raising it here. Ariz. R. Crim. P. 32.2(a)(2).

finding additional factors. *See Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d at 625 ("[O]nce a jury finds or a defendant admits a single aggravating factor, the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute.").

¶5 Moreover, neither *Price* nor *Cunningham* retreats from *Apprendi*'s rule that a trial court properly may find the fact of a prior conviction. *See Apprendi*, 530 U.S. at 490. These cases invalidate neither *Martinez* nor our May 2007 memorandum decision's reliance on it to conclude that Guillen was not entitled to relief under *Apprendi*. Because neither *Cunningham* nor *Price* provides any basis to afford Guillen the relief he seeks, the trial court did not abuse its discretion in rejecting this claim.

¶6 Guillen's argument that he received ineffective assistance of counsel was raised and decided in his first Rule 32 proceeding. And in that proceeding he also could have raised his claims that he was not given adequate notice of the aggravating factors used in sentencing him, and that his sentence violated his plea agreement. Because he did not, he is precluded from raising these arguments in his third petition for post-conviction relief. Ariz. R. Crim. P. 32.2(a)(2), (3). His argument that, in light of his numerous health concerns, his "conditions of confinement" have created an "aggregate change" in his sentence, entitling him to release from prison, is not cognizable under Rule 32 and we do not address it. *See* Ariz. R. Crim. P. 32.1. For the reasons stated, although we grant review of Guillen's petition, we deny relief. We additionally deny as moot his

"motion to expedite proceedings" and his motion to "submit supplemental new facts" related to his health concerns.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge